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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

## No. 393

LeROY GARBER,
*Appellant,*

vs.

THE STATE OF KANSAS,
*Appellee.*

ON APPEAL FROM THE SUPREME COURT OF KANSAS

## MOTION TO DISMISS

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## INDEX


Motion to Dismiss ..... 1

Opinion Below ..... 2

Jurisdiction ..... 2

Statute Involved ..... 2

Questions Presented ..... 2

Statement of the Case ..... 3

Argument—

I. The Kansas Compulsory School Attendance Law Does Not Violate the Free Exercise Clause of the First Amendment ..... 5

II. The Kansas Compulsory Education Act Does Not Violate the Establishment of Religion Clause of the First Amendment ..... 11

III. The Statute Does Not Offend Against the Equal Protection or Due Process Clauses of the Fourteenth Amendment ..... 12

IV. The Clear and Present Danger Doctrine Is Not Applicable to This Case ..... 12


## Table of Authorities

CASES


*Barbier* v. *Connolly*, 113 U.S. 27, 5 Sup.Ct. 357, 28 L.Ed. 923 (1884) ..... 6

*Commonwealth* v. *Beiler*, 168 Pa.Super. 462, 79 A.2d 134 (1951) ..... 7

*Commonwealth* v. *Bey*, 166 Pa.Super. 136, 70 A.2d 693 (1950) ..... 7

*Commonwealth* v. *Renfrew*, 322 Mass. 492, 126 N.E.2d 109 (1955) ..... 6

*Commonwealth* v. *Smoker*, 177 Pa.Super. 435, 110 A.2d 740 (1955) ..... 7

*Cude* v. *State*, 237 Ark. 927, 377 S.W.2d 816 (1964) ..... 6

*Davis* v. *Beason*, 133 U.S. 333, 33 L.Ed. 637, 10 Sup.Ct. 299 (1890) ..... 10, 11

*Dobins* v. *Commonwealth*, 198 Va. 697, 96 S.E.2d 154 (1957) ..... 7

*In re Currence*, 42 Misc.2d 418, 248 N.Y.S.2d 251 (1963) 6

*In re Shinn*, 195 Cal.App.2d 683, 16 Cal.Rptr. 165 (1961) 6

*Interstate Consolidated Street Rwy. Co.* v. *Massachusetts*, 207 U.S. 79, 28 Sup.Ct. 26, 52 L.Ed. 111 (1907) ..... 6

*Jacobson* v. *Massachusetts*, 197 U.S. 11, 49 L.Ed. 643, 25 Sup.Ct. 358 (1905) ..... 10, 11

*Knox* v. *O'Brien*, 7 N.J.Super. 608, 72 A.2d 389 (1950) 6

*Meyer* v. *Nebraska*, 262 U.S. 390, 43 Sup.Ct. 625, 67 L.Ed. 1042 (1923) ..... 9, 10, 11

*Minersville School Dist.* v. *Gobitis*, 310 U.S. 586, 60 Sup. Ct. 1010, 84 L.Ed. 1375, 127 A.L.R. 1493 (1940) ..... 8

*Myerkorth* v. *State*, 173 Neb. 889, 115 N.W.2d 585 (1962), *app. dism'd*, 372 U.S. 705, 83 Sup.Ct. 1018, 10 L.Ed.2d 125 (1963) ..... 6

*Parr* v. *State*, 117 Ohio St. 23, 157 N.E. 555 (1927) ..... 7

*People* v. *Donner*, 278 App.Div. 705, 103 N.Y.S.2d 757, *aff'd without opinion*, 302 N.Y. 857, 858, 100 N.E.2d 48, *app. dism'd*, 342 U.S. 884, 72 Sup.Ct. 178, 96 L.Ed. 663 (1951) ..... 6-7

*People* v. *Levison*, 404 Ill. 574, 90 N.E.2d 213, 14 A.L.R. 2d 1364 (1950) ..... 7

*People* v. *Turner*, 121 Cal.App.2d Supp. 861, 263 P.2d 685 (1953), *app. dism'd*, 347 U.S. 972, 74 Sup.Ct. 785, 98 L.Ed. 1112 (1954) ..... 6

*Pierce* v. *Society of Sisters*, 268 U.S. 510, 45 Sup.Ct. 571, 69 L.Ed. 1070 (1925) ..... 9, 10

*Prince* v. *Massachusetts*, 321 U.S. 158, 64 Sup.Ct. 438, 88 L.Ed. 645 (1944) ..... 5, 7, 8, 10, 12

*Reynolds* v. *U. S.*, 98 U.S. 145, 25 L.Ed. 244 (1879) ... 9, 10, 11

*Rice* v. *Commonwealth*, 188 Va. 224, 49 S.E.2d 342, 3 A.L.R.2d 1392 (1948) ..... 7

*Shapiro* v. *Dorin*, 199 Misc. 643, 99 N.Y.S.2d 830 (1950), *aff'd without opinion sub nom* ..... 6

*Snyder* v. *Town of Newtown*, 147 Conn. 374, 161 A.2d 770 (1960), *app. dism'd*, 365 U.S. 299, 81 Sup.Ct. 692, 5 L.Ed.2d 688 (1961) ..... 6

*State* v. *Bailey*, 157 Ind. 324, 61 N.E. 730, 59 L.R.A. 435 (1901) ..... 6

*State ex rel. Shoreline School Dist.* v. *Superior Court*, 55 Wash.2d 177, 346 P.2d 999 (1959), *cert. den.*, 363 U.S. 814, 80 Sup.Ct. 1248, 4 L.Ed.2d 1154 (1960) ..... 7

*State* v. *Hershberger*, 103 Ohio App. 188, 144 N.E.2d 693 (1955) ..... 7

*State* v. *Hoyt*, 84 N.H. 38, 146 Atl. 170 (1929) ..... 6

*State* v. *Jackson*, 71 N.H. 552, 52 Atl. 1021 (1902) ..... 6

*State* v. *Peterman*, 32 Ind.App. 665, 70 N.E. 550 (1904) .. 7

*State* v. *Williams*, 56 S.D. 370, 228 N.W. 470 (1929) ..... 7

*Stephens* v. *Bongart*, 15 N.J.Misc. 80, 189 Atl. 131 (1937) 6

*West Virginia State Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 63 Sup.Ct. 1178, 87 L.Ed. 1628, 147 A.L.R. 674 (1943) ..... 8, 10

*Wright* v. *State*, 21 Okla.Cr. 430, 209 Pac. 179 (1922) .... 7

*Zorach* v. *Clauson*, 303 N.Y. 161, 100 N.E.2d 463 (1951), aff'd, 343 U.S. 306, 72 Sup.Ct. 679, 96 L.Ed. 954 (1952) ..... 7, 11

STATUTES

Chapter 409, 1965 Session Laws of Kansas, K.S.A. 72-4801 (1965 Supp.) ..... 2

K.S.A. 72-1106 ..... 4

28 U.S.C. §1257(2) ..... 2

UNITED STATES CONSTITUTION

First Amendment ..... 2, 6, 11

Fourteenth Amendment ..... 2, 12

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

## No. 393

LEROY GARBER,
*Appellant,*

vs.

THE STATE OF KANSAS,
*Appellee.*

ON APPEAL FROM THE SUPREME COURT OF KANSAS

## MOTION TO DISMISS

Appellee, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves that the appeal in the above-entitled case be dismissed on the ground that it does not present a substantial federal question.

## OPINION BELOW

The opinion of the Supreme Court of Kansas, affirming appellant's conviction of violation of the Kansas Compulsory School Attendance Law and upholding the constitutionality of that law, is reported at 197 Kan. 567, 419 P.2d 896, and appears in the appendix to the Jurisdictional Statement filed herein, at page 21. The opinions of the District Court of Reno County, Kansas, finding appellant guilty of such violation and denying his motion for new trial, are unreported, but likewise appear in appellant's Jurisdictional Statement at pages 35 and 47, respectively.

## JURISDICTION

Appellant seeks to have this Court accept jurisdiction under 28 U.S.C. §1257(2).

## STATUTE INVOLVED

Chapter 409 of the 1965 Session Laws of Kansas, K.S.A. 72-4801 (1965 Supp.), is set out in appellant's Jurisdictional Statement at pages 3-4.

## QUESTIONS PRESENTED

1. Whether the foregoing statute, as interpreted and applied to this appellant, violates either the free exercise or establishment of religion clauses of the first amendment to the Constitution of the United States.

2. Whether the foregoing statute, as interpreted and applied to this appellant, violates either the due process or equal protection clauses of the fourteenth amendment to the Constitution of the United States.

## STATEMENT OF THE CASE

The Kansas Compulsory School Attendance Law, a type of law common to nearly all the states, was first enacted in 1874, and has continued on the books, with intermittent amendment, down to the present. Prior to 1965, the statute applied to children between the ages of seven and sixteen with the proviso that it was not applicable to any child who had completed the eighth grade. Effective July 1, 1965, the Kansas Legislature amended the law by eliminating the proviso so that, after that date, the statute required all children, with certain limited exceptions not here material, to attend either "a public school, or a private, denominational or parochial school." It was this amendment which precipitated the present controversy.

LeRoy Garber, appellant herein, is a member of the Old Order Amish Mennonite Church. It had been the practice of members of that church, prior to 1965, to terminate the formal education of their children upon completion of the eighth grade. The reaction of the Amish to the 1965 amendment was the establishment of Harmony School at Yoder, Kansas, to serve as the local Amish parochial school. Harmony School is taught by a single teacher having an eighth grade education and meets in formal classroom session one morning per week. An additional hour per each of the five school days is devoted to home study and the remaining time is allocated to "vocational projects." These projects are performed at home, consist of agricultural tasks for the boys and household projects for the girls, and are supervised by the teacher by means of weekly written reports which each student is required to submit.

Appellant's daughter, Sharon Garber, completed the eighth grade at Elreka Public School in Reno County in

May, 1964, being then fourteen years old. The following September, Sharon was enrolled in a high school correspondence school, the American School of Chicago. In the fall of 1965, although continuing her correspondence work, Sharon was not enrolled in any school, public or private. On October 5, 1965, appellant was served with notice of truancy and, on October 15, Sharon was enrolled in Harmony School at Yoder, Kansas. Thereafter, on October 18, 1965, an information was filed in the Reno County District Court charging that appellant had unlawfully and willfully failed to require his child "to attend continuously a public school or a private, denominational or parochial school taught by a competent instructor. Contrary to Chapter 409 of the 1965 Session Laws of the State of Kansas."

A jury trial being expressly waived by appellant, the case was tried to the court on a stipulated set of facts and upon oral arguments. On January 10, 1966, appellant was adjudged guilty as charged, the court holding that appellant's religious beliefs were no defense to a violation of the Compulsory School Attendance Act and that that act did not infringe upon his freedom of religion. The court construed the act together with K.S.A. 72-1106, which provides the length of the school day for public schools, and held that attendance at Harmony School was not attendance at a parochial school "for such period as the public school of the district in which the child resides is in session."

A motion for new trial was, on January 24, 1966, overruled, and appeal to the Kansas Supreme Court followed.

The Supreme Court of Kansas, in an opinion filed November 5, 1966, affirmed the conviction, holding that the statute did not violate any of the appellant's constitutionally guaranteed religious freedoms.

## ARGUMENT

### I. The Kansas Compulsory School Attendance Law Does Not Violate the Free Exercise Clause of the First Amendment.

This case squarely presents a conflict of competing interests which has faced this Court before in other circumstances. In *Prince* v. *Massachusetts*, 321 U.S. 158, 64 Sup.Ct. 438, 88 L.Ed. 645 (1944), Mr. Justice Rutledge, speaking for the Court, described that conflict:

> "On one side is the obviously earnest claim for freedom of conscience and religious practice. With it is allied the parent's claim to authority in her own household and in the rearing of her children. . . . Against these sacred private interests, basic in a democracy, stand the interests of society to protect the welfare of children, and the state's assertion of authority to that end . . . The last is no mere corporate concern of official authority. It is the interest of youth itself, and of the whole community, that children be both safeguarded from abuses and given opportunities for growth into free and independent well-developed men and citizens." 321 U.S. at 165.

In resolving that conflict, he notes that "the safest and most objective recourse is to the lines already marked out, not precisely but for guides, in narrowing the no man's land where this battle has gone on." Those guidelines leave little doubt as to the proper resolution of the present case.

In a democratic society, the strength and well-being of the nation, the continued existence of its government and way of life, and the development and progress of its people depend, to a peculiar degree, upon the enlightenment and education of its citizenry. It cannot be doubted that the state of Kansas, as a legitimate exercise of its

sovereign police power to provide for the health, safety, and welfare of its citizens, may provide for the education of its youth. *Interstate Consolidated Street Rwy. Co.* v. *Massachusetts*, 207 U.S. 79, 28 Sup.Ct. 26, 52 L.Ed. 111 (1907) (Holmes, J.); *Barbier* v. *Connolly*, 113 U.S. 27, 5 Sup.Ct. 357, 28 L.Ed. 923 (1884). The great majority of the states have provided for this important interest by enacting laws requiring children of the state to attend school.[1] Such laws have received the overwhelming approval of the state courts in the face of constitutional challenges based upon first amendment guarantees of religious freedom and upon the right of the parent to control the upbringing of his child. *Cude* v. *State*, 237 Ark. 927, 377 S.W.2d 816 (1964); *In re Shinn*, 195 Cal.App.2d 683, 16 Cal.Rptr. 165 (1961); *People* v. *Turner*, 121 Cal.App.2d Supp. 861, 263 P.2d 685 (1953), *app. dism'd*, 347 U.S. 972, 74 Sup.Ct. 785, 98 L.Ed. 1112 (1954); *Snyder* v. *Town of Newtown*, 147 Conn. 374, 161 A.2d 770 (1960), *app. dism'd*, 365 U.S. 299, 81 Sup.Ct. 692, 5 L.Ed.2d 688 (1961); *State* v. *Bailey*, 157 Ind. 324, 61 N.E. 730, 59 L.R.A. 435 (1901); *Commonwealth* v. *Renfrew*, 322 Mass. 492, 126 N.E.2d 109 (1955); *Myerkorth* v. *State*, 173 Neb. 889, 115 N.W.2d 585 (1962), *app. dism'd*, 372 U.S. 705, 83 Sup.Ct. 1018, 10 L.Ed.2d 125 (1963); *State* v. *Hoyt*, 84 N.H. 38, 146 Atl. 170 (1929); *State* v. *Jackson*, 71 N.H. 552, 52 Atl. 1021 (1902); *Knox* v. *O'Brien*, 7 N.J.Super. 608, 72 A.2d 389 (1950); *Stephens* v. *Bongart*, 15 N.J.Misc. 8[illegible], 189 Atl. 131 (1937); *In re Currence*, 42 Misc.2d 418, 248 N.Y.S.2d 251 (1963); *Shapiro* v. *Dorin*, 199 Misc. 643, 99 N.Y.S.2d 830 (1950), *aff'd without opinion sub nom*; *People* v. *Donner*, 278 App.Div. 705, 103 N.Y.S.2d 757, *aff'd without opinion*, 302 N.Y. 857,

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1. In *People* v. *Turner*, 121 Cal.App.2d Supp. 861, 263 P.2d 685 (1953), the court remarked that, at the time of its opinion, only 11 of 48 states allowed home instruction, and that such instruction was specifically conditioned in all but 2 of those 11. 121 Cal.App.2d Supp. at 867, 263 P.2d at 688.

858, 100 N.E.2d 48, *app. dism'd*, 342 U.S. 884, 72 Sup.Ct. 178, 96 L.Ed. 663 (1951); *State* v. *Hershberger*, 103 Ohio App. 188, 144 N.E.2d 693 (1955); *Parr* v. *State*, 117 Ohio St. 23, 157 N.E. 555 (1927); *Commonwealth* v. *Smoker*, 177 Pa.Super. 435, 110 A.2d 740 (1955); *Commonwealth* v. *Beiler*, 168 Pa.Super. 462, 79 A.2d 134 (1951); *Commonwealth* v. *Bey*, 166 Pa.Super. 136, 70 A.2d 693 (1950); *State* v. *Williams*, 56 S.D. 370, 228 N.W. 470 (1929); *Dobins* v. *Commonwealth*, 198 Va. 697, 96 S.E.2d 154 (1957); *Rice* v. *Commonwealth*, 188 Va. 224, 49 S.E.2d 342, 3 A.L.R.2d 1392 (1948); *State ex rel. Shoreline School Dist.* v. *Superior Court*, 55 Wash.2d 177, 346 P.2d 999 (1959), *cert. den.*, 363 U.S. 814, 80 Sup.Ct. 1248, 4 L.Ed.2d 1154 (1960); *cf. Zorach* v. *Clauson*, 303 N.Y. 161, 100 N.E.2d 463 (1951), aff'd, 343 U.S. 306, 72 Sup.Ct. 679, 96 L.Ed. 954 (1952).[2]

This Court has recognized the power of states to require school attendance of all children residing in their confines, even in the face of claims that such a requirement violates the parent's religious scruples. In *Prince* v. *Massachusetts*, *supra*, the court remarked, "and neither rights of religion nor rights of parenthood are beyond limitation. Acting to guard the general interest in youth's well being, the state as parens patriae may restrict the parent's control by requiring school attendance, regulating or prohibiting the child's labor, and in many other ways.

2. *Commonwealth* v. *Beiler*, 168 Pa.Super. 462, 79 A.2d 134 (1951); *Wright* v. *State*, 21 Okla.Cr. 430, 209 Pac. 179 (1922); *People* v. *Levison*, 404 Ill. 574, 90 N.E.2d 213, 14 A.L.R.2d 1364 (1950); and *State* v. *Peterman*, 32 Ind.App. 665, 70 N.E. 550 (1904), are sometimes cited as holding to the contrary. However in the *Beiler* case, the applicable statute provided for "approved tutors," the Oklahoma statute involved in *Wright* made an exemption where "other means of education are provided," and the *Peterman* and *Levison* cases construed their statutes as allowing compliance by home instruction. The latter two cases are in a decided minority in their holdings that home instruction complies with the compulsory school attendance law, and none of the cases reach the question of the constitutionality of a statute which fails to provide an exemption in case of home instruction.

Its authority is not nullified merely because the parent grounds his claim to control the child's course of conduct on religion or conscience." 321 U.S. at 166. Appellant seeks to distinguish this case with the remark that "a state may well have a greater interest in keeping a nine year old off the city streets than in keeping a 15 year old from attending a parochial school which has less than the required number of classroom hours." Jurisdictional Statement, p. 16. The State of Kansas, however, is not prepared to say that the parent's denial to his child of the right to full self-realization, which is the triumph of our democracy and which is absolutely dependent upon adequate education, is any less serious than threats to the child's physical well-being. Its legislature has acted to prevent that as well as other abuses and this Court should uphold that salutary action.

Chief Justice Stone, in his dissenting opinion in *Minersville School Dist.* v. *Gobitis*, 310 U.S. 586, 60 Sup.Ct. 1010, 84 L.Ed. 1375, 127 A.L.R. 1493 (1940), stated that, "The state concededly has power to require and control the education of its citizens. . . ." and that ". . . the state is free to compel attendance at school and require teaching by instruction and study of all in our history and in the structure and organization of our government, including the guaranties of civil liberty which tend to inspire patriotism and love of country." 210 U.S. at 603, 604. When the Court subsequently reversed the *Gobitis* decision, in *West Virginia State Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 63 Sup.Ct. 1178, 87 L.Ed. 1628, 147 A.L.R. 674 (1943), it quoted approvingly from that passage in the Chief Justice's opinion. 319 U.S. at 631.

Even where the Court has set restrictions on the states' police powers with regard to education, it has carefully pointed out that the power to compel the education

of children was not being questioned. In *Pierce v. Society of Sisters*, 268 U.S. 410, 45 Sup.Ct. 571, 69 L.Ed. 1070 (1925), a case which held that the state could not restrict the parents' freedom of choice in selection of schools for their children by requiring that children attend only public schools, the Court expressly pointed out:

> "No question is raised concerning the power of the state reasonably to regulate all schools, to inspect, supervise, and examine them, their teachers and pupils; to require that all children of proper age attend some school, that teachers shall be of good moral character and patriotic disposition, that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare." 268 U.S. at 534.

Similarly, where it was held that a prohibition against teaching any other than the English language until the pupil has passed the eighth grade is unconstitutional, the Court noted:

> "The power of the state to compel attendance at some school and to make reasonable regulations for all schools, including a requirement that they shall give instructions in English, is not questioned." *Meyer v. Nebraska*, 262 U.S. 390, 402, 43 Sup.Ct. 625, 67 L.Ed. 1042 (1923).

In *Reynolds v. U. S.*, 98 U.S. 145, 25 L.Ed. 244 (1879), the respective spheres of freedom of religion and the law were delineated:

> "Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices. . . . Can a man excuse his practices [which violate the law] because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself." 98 U.S. at 166-67.

Properly viewed, the question is one of parental control versus the state acting as parens patriae. Appellant's claim that his religious liberties are infringed in the instant restriction of his control of his daughter adds nothing to the merits of his case. *Prince* v. *Massachusetts, supra.* The family is not placed beyond regulation in the public interest by a claim of religious liberty. *Prince* v. *Massachusetts, supra; Reynolds* v. *U. S., supra; Davis* v. *Beason,* 133 U.S. 333, 33 L.Ed. 637, 10 Sup.Ct. 299 (1890). The authority of the parent must yield to the authority of the state acting to safeguard the welfare of its youth. *Jacobson* v. *Massachusetts,* 197 U.S. 11, 49 L.Ed. 643, 25 Sup.Ct. 358 (1905); *Prince* v. *Massachusetts, supra; cf. Meyer* v. *Nebraska, Pierce* v. *Society of Sisters, West Virginia State Bd. of Educ.* v. *Barnette,* all *supra.*

Kansas may, therefore, constitutionally require appellant to send his daughter to school until she reaches age 16.

The logical corollary of the power to compel school attendance is the power to establish minimum standards for all schools. Without this power, the state could not prevent sham compliance with its compulsory education act and the great ends for which that law was adopted would be subverted. If the state is to achieve its legitimate purpose of educating its citizenry it must be able to prescribe standards relating to curriculum, facilities, competence of instructors and similar subjects. There is no more important requirement than that relating to the time the school is to be in session. Appellant may not, by asserting that it is his religious conviction that his children should not attend formal school more than one morning per week, avoid compliance with the compulsory education law any more than he could by asserting it to be his belief that his children should not be educated at all.

## II. The Kansas Compulsory Education Act Does Not Violate the Establishment of Religion Clause of the First Amendment.

Appellant urges that the statute here involved disallows the Amish parochial school, and that school being disfavored, all other parochial schools are preferred, violating the establishment of religion clause of the first amendment.

This argument must fail for the reason that Kansas has not disallowed Amish parochial schools. The statute, by its express terms, recognizes, as does the Kansas Court, 197 Kan. at 573, that parents have a right to educate their children elsewhere than in the public schools. It could not be contended otherwise. *Pierce* v. *Society of Sisters, supra.* All that is sought by the state is that the school established by the Amish comply with minimum state educational requirements concerning school hours. The right to educate their children without the public schools does not exempt the Amish from compliance with state requirements. *Zorach* v. *Clauson, supra; cf. Pierce* v. *Society of Sisters,* and *Meyer* v. *Nebraska, supra.*

It cannot successfully be contended that a statute which fails to provide for home study in lieu of school attendance and is repugnant to appellant's religion but is not offensive to most other faiths, prefers all other religions over that of appellant; or that such a statute is a law "respecting the establishment of religion". The bigamy laws offended only the Mormons and were nevertheless held valid. *Reynolds* v. *United States, supra*; *Davis* v. *Beason, supra.* The compulsory vaccination laws involved in *Jacobson* v. *Massachusetts, supra,* were repugnant to only a small minority of sects and were still upheld. The statute requiring school attendance six hours per day, five days

per week, is uniformly applied to all children in Kansas. Indeed, appellant's fears of establishment of religion might be justified if the statute were inapplicable to the Amish while applying to all other religions.

**III. The Statute Does Not Offend Against the Equal Protection or Due Process Clauses of the Fourteenth Amendment.**

Since there is no preference of other parochial schools over that of the Amish, appellant's argument that such preference constitutes a denial of the equal protection of the laws and a deprivation of liberty without due process of law must also fail.

**IV. The Clear and Present Danger Doctrine Is Not Applicable to This Case.**

Appellant complains that the Kansas court failed to indicate what criterion it used in determining the constitutionality of the statute. He urges that the proper criterion is the clear and present danger test. A similar contention was made in *Prince* v. *Massachusetts*, *supra*, and evoked the following reply:

> "The state's authority over children's activities is broader than over like actions of adults. This is peculiarly true of matters of public activities and in matters of employment. A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies. It may secure this against impeding restraints and dangers within a broad range of selection." 321 U.S. at 168.

The Kansas compulsory school attendance act is within that "broad range of selection."

WE THEREFORE RESPECTFULLY SUBMIT THAT APPELLANT PRESENTS NO SUBSTANTIAL QUESTION FOR THE DECISION OF THIS COURT, AND THAT THE APPEAL SHOULD BE DISMISSED.

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